Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WALCHER & FOX, INC.,
Cross-Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, AND VAL HELLDOBLER,
Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Circuit erred in holding that, as a matter of law, the intent of the language in a series of project-only labor agreements is immaterial to the court's determination of the contracting parties rights and obligations thereunder?

Whether the Sixth Circuit erred in holding that because the written notations of the contracting parties on a preprinted labor contract were ambiguous and thus not sufficient to place a fringe benefit administrator on notice that the parties had modified the obligations set forth in the preprinted contract, then, the administrator may ignore the contracting parties written agreement and rely solely on the preprinted language?

Whether project-only labor agreements obliged the employer to make fringe benefit contributions on behalf of all of its employees when it was determined by the court that "...[t]he course of negotiations, the notations on the contracts themselves and the party's course of dealing all indicate that the Project Agreement were intended to cover union members only"?

Whether the Sixth Circuit Court erred by failing to apply the national labor policy that federal court's do not have the authority to rewrite or modify the terms of a collective bargaining agreement by holding that a fringe benefit fund may disregard and treat as "immaterial" any ambiguous terms or conditions contained in a collective bargaining agreement that may bear upon the payment of fringe benefit contributions because fund administrators are not required to read the minds of contracting parties and may rely upon the preprinted terms of the collective bargaining agreement?

LIST OF PARTIES

Cross-Petitioners

Walcher & Fox, Inc.

Cross-Respondents

The Northwestern Ohio Administrators, Inc.

Other Parties To The Proceeding In The Sixth Circuit

In addition to the above-referenced parties, the additional parties to the Sixth Circuit proceedings were the International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 55 and Val Helldobler.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Walcher & Fox, Inc., ("W&F") respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals of the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeal of the Sixth Circuit on the merits is reported at 270 F.3d 1018 (6th Cir. 2001), and is reproduced in Appendix A at 1a. The Findings of Fact and Conclusions of Law the United States District Court for the Northern District of Ohio is unreported and is reproduced in Appendix B at 27 a. The Initial Opinion and Order of the United States District Court for the Northern District of Ohio is unreported and is reproduced at App. C at 39a.

JURISDICTION

The Court of Appeals for the Sixth Circuit was issued November 6, 2001. This Court has jurisdiction under 28 USC 1254(1).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 provides as follows:

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets.

(c) Jurisdiction

For the purposes of action and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized

officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of questions of agency

For the purposed of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

Northwestern Ohio Administrators, Inc. ("NOA") is a not for profit corporation charged with collecting employer contributions to several jointly administered multi-employer benefit plans under ERISA and the Labor-Management Relations Act ("LMRA"). Walcher & Fox, Inc., ("W&F") is a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings. Third-Party Defendant International Association of Bridge, Structural and Ornamental Ironworkers Local Union No. 55 ("the Union" or "Local 55") is a labor organization whose craft jurisdiction encompasses the fabrication, production, erection and construction of all iron, steel and associated metals in its geographical area. At all material times hereto, Third-Party

Defendant Val Helldobler ("Helldobler") was a business agent for the Union.

The record on appeal establishes the following facts. In September, 1996, on several occasions, Helldobler approached the W&F at its Arkam Steel project site in Temperance, Michigan, urging the owners, James Walcher and Jeffrey Fox, to unionize their company. They repeatedly declined these invitations specifically because the company was new formed and still in its infancy and, as such, could not afford to pay all of its employees Union scale wages and benefits.

Then, on September 18, 1996, Helldobler adjusted the course of the negotiations with the Company by suggesting that the Company enter into a labor contract covering only one or two union journeymen to be provided by Local 55 so that, hopefully, the Union would demonstrate to W&F the advantages of a union workforce. After a discussion lasting approximately two hours, and with the full knowledge and intent of the parties that this arrangement would bind W&F to pay Union scale wages and benefits *only* to the one or two union members supplied by the Union and not the remainder of its employees, W&F and the Union entered into a one time, project specific labor agreement covering the two Union ironworkers to be provided for the Arkam Steel project.[1] The

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[1] The District Court specifically found that "Company co-owners Walcher & Fox presented significant, unrebutted evidence that they and Helldobler understood the Project Agreements would cover Union members only, and not employees who were not members of the Union. The course of negotiations, the notations on the contracts themselves, and the parties' course of dealing all indicate that the Project Agreements were intended to cover Union members only." (App. B at 35a.)

parties memorialized their agreement thus reached by means of a holographic notation right on the face of the one page pre-printed form agreement with the following words of limitation: "2 MEN, ARKAM STEEL JOB ONLY."[2] While these words may have little or ambiguous meaning to the rest of the world, they had significant economic meaning to James Walcher and Jeffrey Fox. As the District Court later found, the language "2 MEN" was the written reference to the parties agreement that W&F would be referred two union men on the Arkam Steel job only, who would receive Union scale and benefits, and the rest of W&F's regular non-union workforce would be paid as they had been.

During the course of the parties' relationship thus forged, the parties came to view their arrangement at the Arkam Steel Project as mutually advantageous. W&F and the Union therefore entered into four additional agreements under substantially the same terms, conditions and limitations as set forth on the Arkam project: the Crabb Road project (December 13, 1996); the Midwest Tool & Die project (April 2, 1997); the Monroe Mold & Die project (April 14, 1997); and the Unique Tool & Die project (May 20, 1997). (See App. B at 31a-32a.)[3] (The foregoing agreements in

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[2] Specifically, Jeffrey Fox authored the handwritten portion of the labor agreement.

[3] The agreements were identical in form and substance. The Crabb Road Project Agreement, which was the second agreement entered into, also contained an additional handwritten notation which stated: "1 Journeyman and 1 Apprentice 8th man weekly benefit pay." The testimony of James Walcher and Jeffrey Fox, asserting that all five of the Project Agreements requiring Union scale wages and benefits applied only to the Union employees, was unrebutted at trial. (App. B at 35a.) Additionally, the evidence

addition to the agreement for the Arkam Steel project are collectively referred to as "the Project Agreements.")

In strict accord with the written Project Agreements, the Union provided the agreed upon manpower for each project, and the Company made fringe benefit payments only for the Union members employed. Specifically, as the District Court, as affirmed by the Sixth Circuit concluded:

> Between September 1996 and September 1997, the Company paid its fringe benefit and pension fund contributions obligations on a weekly basis, for the benefit of its Union employees only. The weekly payments and reports contained the names of one or two Union employees. No other Company employee joined the Union, and the Company did not comply with the CBA as to those employees. The Company maintained its own benefits plan for its non-Union employees.

(See App. B at 329.) Thus, there is no dispute the Company met its contractual obligations to make fringe benefit contributions on behalf of Union members referred by the Union.

Like W&F, the Union acted consistent with the "2 man" language and its understanding that the Project Agreements covered only the Union members referred by the Union to work on the five respective projects. As the District Court determined:

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showed that the parties, in fact, performed all five contracts under the same terms, conditions and limitations.

> 'Between September 1996 and September 1997,] Helldobler generally picked up the Company's weekly benefits check at the work site. He apparently knew that the Company was not making benefits contributions on behalf of all of its members. Helldobler never complained to the Company about its failure to make benefits contributions on behalf of its non-Union employees. The Union never grieved the Company's failure to make benefits contributions on behalf of its non-Union employees.

(See App. B at 32a.)

As further evidence that the parties had entered into Project Agreements covering only the Union members referred by the Union, in September 1997, Helldobler approached W&F again about entering into a collective bargaining agreement that would cover all of W&F's employees. As the District Court concluded, "Helldobler insisted the Company go all-Union if it were going to do [two more Toledo area] jobs." (See App. B at 33a.) Obviously, Helldobler would have had no need to attempt to get W&F to sign an all-encompassing collective bargaining agreement under which it would "go all-Union" if the Company already had such an agreement.

W&F refused and, in retaliation, the Union started picketing and contemporaneously NOA demanded that W&F submit to a payroll audit of all its employees. W&F refused to submit to a payroll audit for all of its employees and after several months of unsuccessful efforts to resolve their differences, NOA filed a lawsuit in the United States District Court for the Northern District of Ohio, Western Division, on

August 3, 1998. As a third party beneficiary of the five Project Agreements, NOA alleged, *inter alia* that W&F's refusal to submit to a payroll audit for all its employees, and its refusal to remit contributions on behalf of all its employees, as opposed to only the Union members, constituted a breach of the five Project Agreements.

Initially, the District Court bifurcated the case into two separate phases.[4] The first phase of the litigation was directed solely to the scope of the Project Agreements, or more specifically, whether the Project Agreements covered all employees or only the Union employees. The second phase of the litigation would be the determination of liability, if the District Court found that the Project Agreements applied to all employees.

NOA moved the District Court for partial summary judgment on its behalf, seeking judgment as a matter of law that the scope of the five Project Agreements included all employees as opposed to solely the Union members supplied by the Union. NOA asserted it was entitled to rely upon the printed text of the Project Agreements which, according to NOA, clearly and unambiguously required contributions on behalf of all employees and not only the Union members supplied by the Union. The District Court denied NOA's motion on the express basis that the Project Agreements were ambiguous due to the handwritten notation(s). In pertinent part, the Court stated:

> [t]he "2-men Arkam steel job only" notation appears on the face of the contract, and both

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[4] Later, when W&F impleaded the Union and Helldobler as third party defendants, the case was trifurcated, with the third phase being a determination of the third party defendant's liability.

> sides seem to agree that the parties intended it to be part of the contract. The notation is ambiguous. Both sides have offered colorable interpretations of the notation, and those interpretations would lead to different outcomes with regard to the scope of coverage issue. The ambiguity can be resolved only by means of extrinsic evidence, and that evidence is in conflict.

(See App. C at 46 a.) As the Court held, both sides offered "colorable" interpretations of the ambiguous language in the Project Agreements. Whichever interpretation was found true would lead to a different outcome. Thus, if W&F's interpretation was true, the Project Agreements covered only the Union individuals referred by the Union and W&F had completely fulfilled its contractual obligations. On the other hand, if NOA's interpretation was true, the Project Agreements were not limited in this fashion and W&F would owe additional contributions. The District Court opined:

> The problem with NOA's argument is that written notations, which notations are directly on the face of the contract, can be construed as limiting the coverage of the agreement to Union members only. (App. C at 46 a.)

Thus, the District Court's findings, affirmed by the Sixth Circuit appeared to leave little in doubt. The contracting parties "intended" the "2 man" language "to be part of the contract" and now all the District Court need do was to conduct an evidentiary hearing in order to select which interpretation of the ambiguous "2 man" language should be applied.

On November 22, 1999, the District Court conducted a bench trial limited to the above scope of coverage issue. In its *January 12 Conclusions of Law*, the District Court framed the issue as "...whether cryptic handwritten notations on two of the Project Agreements sufficiently put NOA, the third party beneficiary to the contract, on notice of a modification to the printed terms of the Agreements."(See App. B at 35a-36a.) Throughout the course of the litigation leading to trial, the issue as decreed by the District Court had consistently been whether the handwritten notations actually memorialized an agreement between the Union and W&F to limit the scope of the contract's coverage to Union members supplied by the Union to work on the projects, or whether the notations merely referred to the number of Union employees to be provided. Specifically, sufficiency of notice to NOA was never raised prior to or during the November 22, 1999 trial. As the Sixth Circuit noted, the district court trifurcated the case to first determine "...the scope of the agreements...." - that is whether the project agreement covered the union referred employees or all employees. (See App. A at 3a.) Notice to the third party beneficiary has no relationship to scope.

At trial, the Company offered unrebutted testimony that the handwritten notations strictly limited the scope of coverage to Union members supplied by the Union, as the court expressly determined. Specifically, the District Court, as affirmed by the Sixth Circuit, made the following Findings of Fact and Conclusions of Law:

> ...He [Helldobler] suggested that the Company hire one or two Union workers, with only those workers subject to Union pay and benefits scales, to demonstrate how good Union workers were. Walcher & Fox agreed

to that proposal, with the understanding that their treatment of non-Union workers would not be affected by the hire of Union workers. (App. B at 29a-30a.)

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Walcher & Fox did not intend to agree to remit the required contributions for their employees who were not Union members. They orally agreed with Helldobler that the Company's fringe benefit contribution obligation applied only to employees who were also Union members and memorialized that agreement by means of a handwritten notation on the face of the contract that read "2-men Arkam steel job only."
(App. B at 31a.)

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Company co-owners Walcher and Fox presented significant, unrebutted evidence that they and Helldobler understood the Project Agreements would cover Union members only, and not employees who were not members of the Union. The course of negotiations, the notations on the contracts themselves, and the parties' course of dealing all indicate that the Project Agreements were intended to cover Union members only.

(See App. B at 35a .)

Notwithstanding the "significant unrebutted evidence" presented concerning the agreement reached between W&F and the Union, the District Court held that "the *contracting*

parties' understanding of their agreement is not the question before this Court." (See App. B at 35a.) The court subsequently concluded, in contrast with its denial of NOA's *Motion for Partial Summary Judgment*, that NOA was entitled to rely strictly on the type-written language on the face of standard pre-printed form agreements on the grounds that NOA, as a mere third-party beneficiary to the contract, was not sufficiently put on notice of the "modification" to the printed terms. In addition, despite its express findings that the Project Agreements were limited in scope to the Union members, the District Court, as affirmed by the Sixth Circuit, determined that NOA was entitled to collect contributions for all employees thereby granting NOA greater rights than provided by the terms of Project Agreements. Thus, the District Court, as affirmed by the Sixth District, disregarded that the parties written agreement to limit the scope of Project Agreement to Union members and held that since the third party-beneficiary could not have understood the ambiguous notations on the Project Agreements, it could ignore them and enforce the language in the pre-printed form that required contributions on all ironworker employees.

In the interlocutory appeal the Sixth Circuit affirmed the decision of the District Court. In affirming the District Court's decision, the Sixth Circuit agreed with the District Court finding that the notations in the agreement were ambiguous. It further held that the law in the Sixth Circuit does not require fund administrators to read the minds of contracting parties; rather, administrators are permitted to rely upon the unambiguous terms of the agreement between the parties. The non-specific notes on the Project Agreements were not sufficient to put NOA on notice and those notations did not otherwise indicate an intent to NOA that they were to supercede the unambiguous typed provisions in the preprinted agreement.

Thus, the Sixth Circuit likewise determined that the ambiguous terms that W&F and the Union had handwritten on the preprinted agreement which the District Court held were intended to constitute an agreement that W&F only need make contributions to fringe benefit funds for those ironworkers referred to W&F by the Union is "immaterial." (App. A at 8a) Otherwise stated, the terms and conditions of the collective bargaining agreement entered into between the parties is to be ignored whenever a fringe benefit fund, a mere third party beneficiary to the agreement cannot understand what any ambiguous term or condition of the collective bargaining agreement might mean.

REASONS FOR GRANTING THE WRIT

I. As A Matter Of National Labor Policy Federal Courts Have No Authority To Modify The Terms Of A Collective Bargaining Agreement Between Parties.

It is now well settled that, as a matter of national labor policy, federal courts do not have the authority to rewrite collective bargaining agreements. This Court held in HK Porter Co., Inc. v. NLRB, 397 U.S. 99, 109 (1970), that it is the sole role of the National Labor Relations Board to ensure that the process pursuant to which bargaining occurs and the use of attendant economic weapons are executed peacefully and lawfully. 397 U.S. at 99. Although this Court in HK Porter was addressing the role of the Board in the bargaining process, it is clear that the same restriction applies to the federal courts. In United Mine Workers Health & Retirement Funds v. Robinson, 445 U.S. 562, Note 21 (1982), this Court held that "...a federal court has no authority to modify substantive terms of a collective bargaining agreement." Thus, in the case at bar, the federal

courts have no authority to impose substantive terms upon W&F to which it did not agree with the Union during the negotiations that gave rise to the Project Agreements. What a fringe benefit fund administrator or a federal court may think "2 men" means, and how it should be applied to the payment of fringe benefits contributions carries no weight under the well settled national labor policy. All that matters under our nation's labor policy is what W&F and the Union intended those words to mean.

The Union engaged in the bargaining process with W&F in which various economic considerations were traded for others as part of the "give in take" inherent in that process. It is improper for a third party, a federal court, to step in thereafter and ignore the economic impact of making changes in rates of pay, wages, hours or other terms or conditions of employment. Here the parties determined that with regard to rates of pay and wages that W&F would only make contributions to the union sponsored fringe benefit funds for those ironworkers referred by the Union hall. W&F's own employees would continue to be covered by W&F's own health insurance and retirement plans and as such, W&F would not be obligated to make any contributions on its own workforce. In striking such a bargain, the Union obtained the benefit of having W&F employ two individuals provided by the Union in an attempt to prove the value of Union provided workers, while W&F ensured that it was only bound to pay wages and benefits for the individuals provided by the Union and not all its other employees. Specifically, W&F agreed to particular wage rates and benefits for the workers provided by the Union based on the trade off that union scale and fringe benefit contributions were not owed for its regular employees. If, on the other hand, the Union had not agreed that fringe benefit contributions were not owed for these other employees, then, W&F would have refused to

execute the project agreement or insisted on some other terms to minimize the economic impact of making contributions for all employees, such as a lower wage rate.

In resolving the ambiguity in the written terms added to the pre-printed agreement by W&F and the Union, the District Court concluded that the parties had agreed that W&F only had to make contributions on behalf of those employees referred to it by the Union. Now, the Sixth Circuit would ignore the economic trade offs that occurred during the bargaining process and would rewrite the project agreement and require W&F to make contributions on all employees. The basis for the Sixth Circuits holding and its affirmance of the District Court is that under ERISA fund administrators are not required to read the minds of contracting parties and instead, may rely on the unambiguous terms of their own preprinted agreements. So long as whatever the parties have written is ambiguous to the fund, the fund may totally ignore the collective bargaining process and resultant agreement and utilize the enforcement mechanisms of ERISA to collect contributions in accordance with the preprinted terms of their trust agreement arrangements.

As noted above, this Court has held that neither federal courts nor arbitrators may rewrite collective bargaining agreements. To do so, not only unnecessarily interferes with free collective bargaining, but, mandating terms and conditions for collective bargaining agreements destroys the efficacy of the collective bargaining process. It is submitted that whether a term or condition in a collective bargaining agreement is ambiguous in the mind of the administrator of a fringe benefit fund or to a federal court has no bearing whatsoever on the actual scope of the obligation that a signatory employer may have to make contributions. Because a federal court cannot rewrite a collective bargaining

agreement it should resolve the ambiguity in the written agreement, as the District Court did here and then impose the consequences of the resolution of that ambiguity upon the parties to the agreement. Whether a fund administrator may have guessed or otherwise interpreted what an ambiguous term of a collective bargaining agreement meant is irrelevant. Where there is ambiguity in the language of a collective bargaining agreement, a federal court, like an arbitrator, is called upon to take evidence to determine the intent of the parties and then implement that intent. That was not done in the case at bar.

Instead, the entire system of collective bargaining was turned on its head. Suddenly, what the parties had bargained for is "irrelevant" and "immaterial." Instead a mere third party beneficiary to the agreement, utilizing the enforcement powers it has under ERISA now is able to dictate what a parties obligations will be without reference to what was actually agreed upon, in writing between the parties.

It is submitted that the Sixth Circuit's decision is a major departure from national labor policy. Moreover, the Sixth Circuit's decision places ERISA and fund administrators in a position to dictate what was previously the domain of national labor policy under the LMRA.

II. Federal Court, Like Arbitrators, Are Confined To Interpreting And Applying The Terms Of A Collective Bargaining Agreement And Do Not Sit To Dispense Their Own Brand Of Justice.

While the proceedings herein begin with an action in federal court, it is submitted that the District Court initially made a determination of precisely the same nature as would have otherwise would been made by a labor arbitrator. The

complaint, acting much like a grievance claimed that fringe benefits were due and owing upon all employees employed by W&F on all five of the projects covered by the project only agreements. In response, W&F pointed to the language of the project only agreements and argued that the parties had agreed by that language that W&F would only have to pay union scale wages and fringe benefits on the two union men referred to W&F by the Union. Thus, the language "2 Men" is set forth explicitly in the project labor agreement.

The District Court determined that the language in the project only agreement was ambiguous and therefore was unable to interpret and apply the collective bargaining agreement without an evidentiary hearing in which extrinsic evidence could be taken to determine the intent of the parties. As noted above, the District Court considered that one of the interpretations of the language was as W&F claimed – that it only was required to pay union scale and fringe benefits on the two union men referred by the union. In fact, at trial, that is precisely what the District Court determined.

On appeal, the Sixth Circuit, in affirming the District Court held:

> Whether a contract term is ambiguous is a question of law for the court to determine. Tennessee Consol. Coal Co. v. United Mine Workers of America, 416 Fed. 2d 1192, 1198 (Sixth Cir. 1969). The district court concluded that the handwritten notations on the two Agreements were ambiguous. We agree. The law of this circuit does not require fund administrators to read the minds of contracting parties; rather, administrators may rely on the unambiguous terms of the writing. See, New

> Bakery Co. of Ohio, 133 Fed 3d at 759. Here, the cursory and non-specific notes on two of the five Project Agreements were the only pieces of information NOA had that the parties might have intended any modification. Without more, these notations do not indicate an intent to supercede the unambiguous typed provisions. (App. A at 11a.)

As such, the Sixth Circuit held that as long as a fund administrator cannot understand what it believes to be ambiguous in the language of a collective bargaining agreement it may simply ignore what the parties have agreed to and proceed to apply other terms of the agreement in a manner that the funds see fit. Otherwise stated, if an arbitrator/district court finds the terms of a collective bargaining agreement to be ambiguous then, any party that might be affected by ambiguous terms or conditions cannot be said to have been put on notice that the ambiguous terms might affect their rights and therefore they may ignore the intent of the parties.

W&F maintains that the notions propounded by the District Court, as affirmed by the Sixth Circuit are contrary and diametrically opposed to the principles that this Court enshrined as the centerpiece for interpretation of collective bargaining agreement in a series of cases now referred to as the Steelworkers Trilogy. In United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 US 593 (1960), the oft quoted foundational principle in interpretation and application of collective bargaining agreements was set forth as follows:

> ...[A]n arbitrator is confined to interpretation and application of the collective bargaining

> agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When an arbitrator's words manifest in infidelity to this obligation, the courts have no choice but to refuse enforcement of the award. Id. at 597.

It is submitted that the District Court and the Sixth Circuit were "confined" to interpreting and applying the collective bargaining agreement as it was written by the parties. Regardless of how cryptic or ambiguous "2 Men Arkam Steel Job Only" or "1 Journeyman and 1 Apprentice Eighth Man Weekly Benefit Pay" might have seemed to the District Court or the Sixth Circuit, they were "confined" to interpreting and only applying what those words meant to the contracting parties. To do otherwise is nothing more than dispensing the court's own brand of industrial justice.

The very manner in which the Sixth Circuit framed the question before them "...whether...as a matter of law, the intentions of the contracting parties are immaterial..." and "...that the written notations...were not sufficient to place NOA on notice..." flies directly in the teeth of the above quoted admonition. How could any decision by the District Court or affirmance by the Sixth Circuit draw its essence from the collective bargaining agreement if it treated the intentions of the contracting parties as immaterial or even considered whether a third party beneficiary was placed "on notice" as to what the parties collective bargaining agreement meant. W&F submits that the conclusions arrived at by the District Court and the Sixth Circuit "manifest an infidelity" to their respective obligations to merely interpret and apply

the collective bargaining agreement as intended by W&F and the Union.

W&F submits that the continuation of this important national labor policy should be affirmed by this Court by granting review of this cross-petition.

CONCLUSION

It is respectfully requested that, if Plaintiff's Petition for a Writ of Certiorari is granted, this conditional Cross-Petition should likewise be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3536/00-3538

[Filed November 6, 2001]

NORTHWESTERN OHIO ADMINISTRATORS, INC., Plaintiff,	)
v.	)
WALCHER & FOX, INC., Defendant-Appellee/ Third-Party Plaintiff,	)
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 55; VAL HELLDOBLER, Defendants-Appellants/ Third-Party Defendants.	)
NORTHWESTERN OHIO ADMINISTRATORS, INC., Plaintiff-Appellee,	)
v.	)
WALCHER & FOX, INC., Defendant-Appellant/ Third-Party Plaintiff	)

Appeal from the United States District Court
for the Northern District of Ohio at Toledo
No. 98-07443
David A. Katz, District Judge

JUDGES:
Before: KEITH, NORRIS, and BATCHELDER, Circuit Judges.

OPINION

ALICE M. BATCHELDER, Circuit Judge.

These two interlocutory appeals arise out of a single case, and we have therefore consolidated them for purposes of this appeal. Plaintiff-Appellee Northwestern Ohio Administrators, Inc., ("NOA") a non-profit corporation that administers employee benefit plans under the Employment Retirement Income Security Act ("ERISA") and the Labor Management Relations Act ("LMRA"), sued Defendant-Appellant Walcher & Fox Inc. ("W&F"), an Ohio corporation engaged in the construction business, claiming that W&F owed fringe benefit and pension fund contributions for all of its employees pursuant to project agreements entered into by W&F and the International Association of Bridge, Structural, and Ornamental Ironworkers Local Union No. 55 ("the Union"). NOA moved for partial summary judgment and the district court denied the motion, holding that the project agreements were ambiguous because hand-written notations on some of those agreements indicated that the parties may have intended the agreements to cover only the few union members hired by W&F at the behest of the Union's representative Val Helldobler. W&F impleaded the Union and

Helldobler, alleging that they had fraudulently misrepresented the scope of the project agreements and that they were therefore liable for contribution and indemnification for any monies owed by W&F to NOA. The Union and Helldobler moved to dismiss W&F's third-party complaint.

The district court then trifurcated the case to determine (1) the scope of the agreements, (2) liability under the agreements, and (3) liability of the Union and Helldobbler. After a bench trial on the scope of coverage issue, the court concluded that NOA was entitled to rely on the type-written language of the agreements, and that the hand-written notations on those agreements were not sufficient to put NOA on notice of the "modification" envisioned by the parties. Accordingly, the court held, NOA was entitled to collect contributions for all of the Company's employees who worked under the project agreements regardless of whether the parties intended to limit the benefits available under the project agreements to a handful of Union employees. The court certified the issue for interlocutory appeal.

In their motion to dismiss the third-party complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Helldobler and the Union claimed that the federal court did not have subject matter jurisdiction over the action and that the claims were preempted. The district court denied the motion to dismiss and certified the issue for interlocutory review.

We accepted both interlocutory appeals, and we **AFFIRM** both of the district court's orders.

I. Factual Background

This case arises out of an on-going employment dispute between the Union and W&F. W&F is a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings; it contracts with employees on a project-by-project basis. For most of its existence, W&F used exclusively non-union labor. Val Helldobler, an organizer for the Union, approached the owners of W&F in September of 1996, requesting that W&F unionize its workforce. The owners declined, claiming that W&F could not afford to pay Union wages and benefits to all its employees. Helldobler suggested that W&F ease into unionization by hiring one or two union workers per job. It was Helldobler's hope that this incremental approach would demonstrate to W&F the "advantages of a Union workforce."

W&F and the Union negotiated a compromise, and Helldobler made hand-written notations on two of the printed Project Agreement forms. One of those Agreements bears the notation "2-men Arkam Steel job only;" the other bears the handwritten note "1 Journeyman & 1 Apprentice 8th man weekly benefit pay." These markings appear near the signature line of the agreements and no reference to them appears anywhere in the body of the agreement. The three remaining agreements that are the subject of this action contain no such notations, but W&F alleges that they were entered into on similar terms. Helldobler denies that the parties agreed to limit union participation on any project, and states that the handwritten notations indicate a floor for union participation, rather than a ceiling.

Each of the Project Agreements--entitled "Employer Participation Agreements"--at issue in this case incorporates the terms and conditions of the Collective Bargaining Agreement ("CBA") entered into by the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union. Those Employer Participation Agreements provide:

> 1. The Company[1] hereby recognizes the Union as the representative of a majority of its employees designated, acknowledges receipt of a copy of the current Bargaining Agreement and agrees to be bound by the terms and conditions contained therein . . . .
>
> * * *
>
> 4. The Company agrees to make the contributions and deductions to the said Plans at the times and in the amounts specified in the Bargaining Agreement, for all its employees performing the work specified in the Bargaining Agreement.

The CBA provides that each Participating Employer shall:

> make payments of fringe contributions and deductions to each and every employee benefit

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[1] Each agreement expressly provides that Walcher & Fox is "The Company."

> plan for all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union (whether or not the employees are members of the Union).

(CBA, Art. XXVI(B) Par. 148).

W&F presented testimony that the agreements were intended to cover the Union workers only, and not all employees. Between September 1996 and September 1997, W&F paid fringe benefit and pension contributions for the Union employees, and administered its own benefit plan for the non-union employees. Helldobler picked up the weekly benefit checks for the Union members. In September of 1997, Helldobler attempted to organize the non-union workers at the job site but they universally declined to join. Despite the apparent lack of interest on the part of W&F's non-union employees, Helldobler demanded that W&F employ only Union workers for two projects in the Toledo, Ohio, area. W&F refused to accept Helldobler's ultimatum, and the dispute soon escalated to include Union picketing of W&F. Shortly thereafter, Helldobler notified NOA that W&F had failed to make the fringe benefit and pension contributions that Helldobler claimed the CBA provisions incorporated into the Project Agreements required for all of W&F's employees.

In October of 1997, NOA requested that W&F allow a payroll audit for all employees working on the projects covered by the five agreements to determine whether W&F was properly paying the fringe benefit contributions for its employees. W&F refused, claiming that NOA had the right to audit only the records of the handful of Union employees

performing work under the Project Agreements. This lawsuit ensued.

II. Standard of review

Because this is an interlocutory appeal, we have no authority to review the district court's findings of fact, but must confine our review to pure questions of law. *See Foster Wheeler Energy Corp. v. Metro Knox Solid Waste Auth., Inc.* 970 F.2d 199, 202 (6th Cir. 1992). We review the district court's conclusions of law de novo. *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997).

III. NOA's right to collect contributions

W&F claims that the district court's determination on the motion for partial summary judgment, in which the court found the handwritten notations on the Agreements ambiguous, contradicts the court's later conclusion that W&F is required to remit to NOA contributions for all of W&F's employees. NOA counters that following the bench trial, the district court found that the Agreements were not ambiguous; that the written terms of those Agreements required W&F to make contributions for all of its employees; and that established ERISA law entitled NOA to rely only on the printed terms of those Agreements.

It is true that in denying NOA's motion for partial summary judgment, the district court found that because of ambiguity in the Agreements, the court could not determine the intent of the parties. But following the bench trial on the sole issue of whether W&F was obligated under the Agreements to make contributions on behalf of all of its

employees, the district court held as a matter of law that the intent of the parties is not relevant to this issue. Citing *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989), the district court held that section 515 of ERISA permits multi-employer plans to enforce the plain terms of the written agreement regardless of contractual defenses applicable to the original parties, so long as the written document does not place the plan on notice of any modifications. Further, citing *Bakery and Confectionery Union and Indus. Int'l Health Benefits and Pension Funds v. New Bakery Co. of Ohio*, 133 F.3d 955, 959 (6th Cir. 1998), the court held that the actual intentions of the contracting parties, and hence the factual dispute between Helldobler and W&F, are immaterial to this issue.

As we have already pointed out, this matter is before us on an interlocutory appeal, and we are without authority to inquire into the correctness of the district court's findings of fact with regard to the intentions of the parties and whether the notations on the Agreements reflected those intentions. Rather, we must decide whether the district court erred in holding that, as a matter of law, the intentions of the contracting parties are immaterial to the determination of W&F's obligation to make the contributions, and that the written notations made by W&F and the Union were not sufficient to place NOA on notice that it could not rely solely on the typed language of the Project Agreements and the CBA.

W&F argues that third-party beneficiary NOA's right to collect contributions flows from the CBA and therefore cannot be superior to the rights of the primary parties. For

this proposition, it cites a district court opinion, *Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co.*, No. 93 C 3699, 1998 U.S. Dist. LEXIS 3283 (N.D. Ill. March 17, 1998). In that case, the district court denied the plaintiff's motion for summary judgment because the plaintiff sought to rely on past practices and oral understandings of the contract not reduced to writing. Although it makes clear that a pension fund's rights to collect are bounded by the written CBA, *Kroger* does not address the situation before us here, in which the parties memorialized their modifications on the face of a contract, albeit ambiguously. In fact, *Kroger* plainly spells out the ERISA policy that "pension funds are entitled to rely on the writings that establish the employer's obligation to them," *id.* at *18, concluding that an oral agreement between the employer and the union to disregard the text and course of performance cannot prevent the written agreement from being enforced at the insistence of the pension funds because "[a]ny less protection 'may well saddle the plans with unfunded obligations.'" *Id.* at *16 (citations omitted).

W&F also cites the unreported *Craig v. Severino, Inc.*, No. 93-3516, 1994 U.S. App. LEXIS 14715 (6th Cir. June 13, 1994). W&F's reliance on *Severino* is misplaced. In *Severino*, the parties signed a duplicate of a collective bargaining agreement, but specified in writing on the contract that it was limited in scope to just one job. The court found that the parties had executed a new agreement, with the limitation included. In the case at bar, there is no question that the Union and W&F sought to amend the Project Agreements in some way. The question is whether they put NOA on notice of the intended amendments by making what the district court described as "cryptic" notations on the pre-

printed agreement. In *Severino*, the limitation was clearly spelled out at the top of the signature page of the contract. Here, only two of the Project Agreements bear any handwritten markings at all, and they are inserted near the signature line rather than in the body of the contract, or adjacent to any related provision. Moreover, as the district court correctly noted, the parties made no attempt to excise, cross-out, or otherwise manifest their intent to nullify the portion of the pre-printed contract that required that benefits be paid for both union and non-union employees, or otherwise to call attention to the modification.

Even if the notations on the Project Agreements perhaps should have caught the attention of an NOA administrator, nothing in the Agreements indicated that the notations were intended to supercede the unambiguous printed portions of the Agreements. The district court correctly applied the well-established precedent that ERISA funds are accorded a special status and are entitled to enforce the writing, regardless of what defenses may be available under the common law of contracts. *See New Bakery Co. of Ohio*, 133 F.3d at 959 ("The fund stands much like a holder in due course in commercial law who is entitled to enforce the writing 'without regard to understandings or defenses applicable to the original parties.'")(citation omitted). The district court also relied on *Gerber Truck Serv., Inc.*, 870 F.2d 1148, which presents a factual scenario similar to the one before us today. The *Gerber* court articulated the policy of section 515 of ERISA, namely, that the administrator is not required to look into potential side agreements. This court has adopted the *Gerber* position. *See New Bakery Co. of Ohio*, 133 F.3d at 959 ("Because, under section 515, multiemployer plans are entitled to rely on the literal terms of written

commitments between the plan, the employer, and the union, the actual intent of and understandings between the contracting parties are immaterial.").

Whether a contract term is ambiguous is a question of law for the court to determine. *Tennessee Consol. Coal Co. v. United Mine Workers of Am.*, 416 F.2d 1192, 1198 (6th Cir. 1969). The district court concluded that the handwritten notations in the two Agreements were ambiguous. We agree. The law of this circuit does not require fund administrators to read the minds of contracting parties; rather, administrators may rely on the unambiguous terms of the writing. *See New Bakery Co. of Ohio*, 133 F.3d at 959. Here, the cursory and non-specific notes on two of the five Project Agreements were the only pieces of information NOA had that the parties might have intended any modification. Without more, these notations do not indicate an intent to supercede the unambiguous typed provisions.

W&F also claims that the entire contract is void because the district court ruled that "the attempted amendments, if effective, would have produced an illegal contract." But the district court did not hold that those attempted modifications were in fact effective; rather, the court opined that the handwritten notations, if interpreted as modifying the contract in the way in which W&F claims, would make the contract illegal, and that NOA had no reason to suppose that those handwritten notations were intended to modify the contract so as to render it illegal. The district court's observation on this issue has nothing to do with whether NOA was on notice that a side agreement had been reached.

Accordingly, we **AFFIRM** the district court's decision that NOA was entitled to rely solely on the printed terms of the Project Agreements.

IV. Motion to Dismiss Third-party Complaint

In its third-party complaint, invoking both supplemental jurisdiction and jurisdiction under 29 U.S.C. §185(c) (2001), W&F claims that the Union and Helldobler fraudulently induced W&F to enter into the Project Agreements, fraudulently executed the Project Agreements, and negligently misrepresented the scope of those Agreements; W&F demands a declaratory judgment that because of the Third-Party Defendants' fraud, the Project Agreements are either void or voidable, and further seeks a judgment against them for indemnification, compensatory and punitive damages, and attorney's fees. The Union and Helldobler claim that the district court erred in refusing to dismiss the third-party complaint against them pursuant to Federal Rules of Civil Procedure 12 (b)(1) and (6). Specifically, they claim that: (1) the third-party complaint is subject to dismissal under the rule of *Textron Lycoming Reciprocating Engine Div. Avco Corp. v. U.A.W.*, 523 U.S. 653, 140 L. Ed. 2d 863, 118 S. Ct. 1626 (1998); (2) the complaint is preempted by the rule of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959); (3) the complaint is preempted by section 301 and therefore subject to dismissal; and (4) Helldobler is immune from suit as an individual, pursuant to section 301(b) and the rule in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962).

We find these claims to be without merit and AFFIRM the district court's denial of the motion to dismiss.

A. Supplemental Jurisdiction

Helldobler and the Union first claim that the federal court lacked jurisdiction over the third-party complaint because of the limitations set out by the Supreme Court in *Textron*. In that case, the Court concluded that section 301(a) of the LMRA "confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts,'" *Textron*, 523 U.S. at 656, and that "'[s]uits for violation of contracts' under §301 are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Id.* at 657. Because W&F does not claim in its third-party complaint that the Union and Helldobler violated the CBA but instead claims that the third-party's actions render the Project Agreements void, the Defendants argue, the federal court lacks jurisdiction over the complaint. The Union and Helldobler have missed the point. While W&F has indeed asked for a determination that the Project Agreements are void or voidable, it has also asked for judgment against the Union and Helldobler for indemnification and damages in the event W&F is found liable to NOA for the additional contributions--liability that W&F claims arose only because of the Third-Party Defendants' fraud and misrepresentation. The third-party complaint does not present a *Textron* situation, and it is immaterial that the fraud and misrepresentation claims are not cognizable under section 301. Those claims are clearly within the supplemental jurisdiction of the federal court as spelled out in 28 U.S.C. §1367(a) (2001) :

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Neither subsection (b) nor (c) is applicable here. Therefore, unless the district court lacked subject matter jurisdiction for some reason other than the *Textron* rule, which is inapposite here, these claims are properly within the supplemental jurisdiction of the court, arising as they do out of exactly the same facts that gave rise to NOA's complaint against W&F.

The Union and Helldobler also claim that no case or controversy exists because the Project Agreements have expired. This claim is also meritless. W&F has now been held liable to NOA for contributions far in excess of what it allegedly believed it was bound by those Agreements to make. What is at issue in this third-party complaint is whether the Union and Helldobler are liable to W&F for their alleged fraud in inducing W&F to enter into those Agreements, their alleged fraud in the execution of those Agreements, and their alleged misrepresentations as to the number of employees covered by those Agreements. The fact that the Agreements

themselves have now expired is immaterial.

B. Garmon Preemption

The Third-Party Defendants next claim that the third-party complaint is preempted by federal law under the rule in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). The party arguing *Garmon* preemption bears the burden of showing that the conduct at issue is prohibited or protected by the National Labor Relations Act, 29 U.S.C. § 158 (2001), ("NLRA"). *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986).

In *Garmon*, the Supreme Court synthesized its prior NLRA preemption cases: "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The Supreme Court was motivated by the expressed congressional desire for uniformity in the nation's labor policy. *Id.* at 242. To allow the Board to create uniform labor regulations for the nation's workers and employers, and to make use of the Board's expertise in the area of labor relations, the Court sought to exclude the states from the initial process of construing the reach and application of the NLRA.

This same underlying motivation for uniformity, and the principles of federalism, also allowed for exceptions to the general *Garmon* preemption rule. Thus, where the regulated conduct at issue "touched interests so deeply rooted in local

feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act," the Court would not find NLRA preemption. *Id.* at 244. Likewise, where the regulated activity is "merely peripheral" to the central concerns of the NLRA, the states may regulate the activity. *Id.* at 243.

The extent of the NLRA's preemption was elucidated further in *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978). In that case Sears brought a trespass action in state court to enjoin the union from picketing on its property. *Id.* at 183. The Supreme Court ruled that the NLRA did not preempt the employer's state trespass action. *Id.* at 198. The Court refused to apply *Garmon* preemption mechanistically and instead opted for a flexible balancing of the federal need for uniformity, the state's interest in regulating the conduct at issue, and the potential for the state's regulation to threaten unduly the federal regulatory scheme. *Id.* at 188-89. The Court explained that when the conduct is "arguably" prohibited, two factors weigh in determining whether state regulation is preempted: (1) whether there exists a "significant" state interest in protecting its citizens from the conduct; and (2) whether state jurisdiction over the arguable labor violation would entail "little risk" of interfering with the uniform national labor policy. *Id.* at 196. The second of these factors is equivalent to the question of whether the state cause of action is "identical" to a claim that could have been made to the Board. *Id.* If the state-based claim and a potential claim to the Board are identical, then the Board has exclusive jurisdiction because the state regulation impinges directly on the Board's

prerogative to fashion a uniform labor policy. *Id.* In *Sears*, the Court ruled that the state trespass law regulated the location of the picketing, while a claim to the Board would have looked at the motive behind the picketing to discern whether the picketing was an unfair labor practice. *Id.* at 198. Because the two claims were not identical, and because the state has a strong interest in protecting the integrity of its citizens' property, the state could permissibly regulate the union's picketing on the employer's property. *Id.* at 198-200.

Later decisions have further expanded the rationale of *Garmon* and have also displayed the extent of the exceptions to *Garmon*. In *Belknap, Inc. v. Hale*, 463 U.S. 491, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983), the Court rejected a claim of *Garmon* preemption based on state-law misrepresentation and breach of contract claims brought by replacement workers against their former employer. There, the employer had promised the replacement workers that they would retain their jobs even after the settlement of the labor dispute with the union. *Id.* at 494-96. However, as a result of unfair labor practice charges Belknap agreed to lay off its "permanent" replacement workers and rehire the strikers. *Id.* at 496. The Supreme Court held that the replacement workers' state suit against Belknap for fraud in relation to Belknap's promise to the replacements was not preempted because the state claim for fraud was not identical to the unfair labor practice claim brought by the striking workers. *Id.* at 510-11. Since the Board was not concerned with Belknap's representations to the replacement workers, and the replacement workers' suit had no impact on the strikers' unfair labor claims, the state regulation would not interfere with national labor policy as elucidated by the Board. *Id.* Finally, the Court found that the state's interest in protecting

its citizens from misrepresentations was a "substantial interest." *Id.*

Before we address the *Garmon* factors, we must first address the threshold question of whether the Union's conduct at issue here is arguably prohibited by section 8.[2] The state law counterclaim brought by W&F is for fraud in the inducement. The claim is based on the allegedly fraudulent misrepresentations made by the union representative to induce W&F to sign agreements providing for the employment of a discrete number of union employees on particular jobs at particular job sites.

The Ninth Circuit faced a very similar situation in which the employer filed a third-party complaint against a union for fraudulent inducement. *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990). The Ninth Circuit ruled that the union's actions were not "arguably" prohibited as an unfair labor practice. *Id.* at 540. As a result, *Garmon* did not even apply and there was thus no need to reach the question of whether a *Garmon* exception applied. *Id.* Likewise here, the Union has offered no evidence demonstrating that its activities are unfair labor practices. The agreement in question is not a collective bargaining agreement because the union was not the duly elected representative of a majority of the employees, and was not authorized to bargain on the employees' behalf on the terms and conditions of employment. The Union has offered nothing to support its assertion that the conduct at issue in W&F's counterclaim is

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[2] The union does not argue that the activity at issue is arguably subject to section 7.

arguably prohibited by the NLRA, and has therefore failed to meet its burden to show preemption.

The result would be different if the Union had made a misrepresentation connected with a collective bargaining agreement. In *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), this court ruled that a state claim of fraud based on an employer's fraudulent misrepresentations concerning a collective bargaining agreement was preempted because the employer also breached its duty of good faith found in section 8. Unlike the situation here, the state claim involved a collective bargaining agreement, was identical to a claim that could have been brought before the Board, and the Board thus had exclusive jurisdiction under *Garmon*. It was the presence of a collective bargaining agreement and all of the duties attendant to the bargaining process--which are absent here--that caused the preemption of the state law claim in *Serrano*.

Cases in which the Supreme Court found that state law claims were not preempted are applicable to the circumstances here presented. In *Int'l Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 395, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986), for example, the state law claim at issue was one of fraud and misrepresentation against the union. The union had represented to an employee that he was protected from discharge by the NLRA because he was not a supervisor but rather was an employee. *Id.* at 394. The union argued that the state based claim for fraud was arguably identical to the unfair labor practice of discharging an employee for protected union activities. *Id.* The Court spoke specifically to the Union's burden in arguing preemption:

> The precondition for preemption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of preemption and would therefore not be satisfied in this case by a claim, without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one that the Board could legally decide in his favor.

Id. at 394-95. Because the union had failed to provide any evidence that the employee was "arguably" not a supervisor, the Court held that the union had failed to show that the employer's action of firing the employee was "arguably" an unfair labor practice. *Id.*

The case before this court is similar to *Davis* in that the Third-Party Defendants have failed to offer any evidence that this "case is one that the Board could legally decide in [the Union's] favor." *Id.* at 395. Here, the Union appears to claim that its allegedly fraudulent conduct occurred during the collective bargaining process and implicates the duty of good faith required during that process. It is indisputable, however, that the Union was not the representative of W&F's employees and was thus not engaged in collective bargaining. Hence, the Union has failed to show that the activity W&F complains of was "arguably" covered by section 8 of the NLRA.

The policies underlying the range and extent of *Garmon* preemption also counsel a finding of no preemption.

The conduct complained of here can be distinguished from protected or prohibited labor practices because the dispute has nothing to do with the process of collective bargaining, the rights of workers to bargain collectively, or the balance of power between labor and management. In this case, the Union is not representing any employees. There is no dispute between employees and management. The dispute is between the administrator of the pension and benefit fund (a third-party beneficiary) and the Company. Since this dispute presents no threat to the uniformity of federal labor law, and the Board's position as the authoritative interpreter of the NLRA is not threatened, the policies underlying *Garmon* do not require preemption.

In sum, because the Union has failed to demonstrate that its conduct was arguably prohibited by section 8 of the NLRA, *Garmon* preemption does not apply.

C. Section 301 Preemption

The Union and Helldobler next argue that the state law claim asserted in the third-party complaint is preempted by section 301 of the LMRA. Under their theory, the state claim should be preempted under federal law because the issues the court must determine are "inextricably intertwined with the terms of the labor contract."

Section 301 grants to the courts of the United States jurisdiction over issues pertaining to collective bargaining agreements. The Supreme Court has construed section 301 as a grant from Congress to create a federal common law of labor contracts. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957). The grant

is necessary to ensure uniform national interpretation of labor agreements and thus to ensure that rights and duties are clearly understood and to lessen industrial strife occasioned by conflict over differing interpretations of collective bargaining agreements. *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 855-57, 95 L. Ed. 2d 791, 107 S. Ct. 2161 (1987).

Since federal law is the exclusive law used to interpret the duties and obligations contained within collective bargaining agreements, any state law claim that is not independent of rights established by an agreement, and that is "inextricably intertwined" with a determination of the meaning of the terms of an agreement, is preempted by section 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985). Thus, if a state tort relies on or entails interpretation of a collective bargaining agreement, the state claim is preempted. *Id.* at 217-18. In *Allis-Chalmers* for example, the Court found that the Wisconsin cause of action, alleging a breach of good faith in performance of a contract, was preempted by section 301 because the "state-law rights and obligations ... [did] not exist independently of" the collective bargaining agreement. *Id.* at 213.

The Supreme Court has further defined when a state law right or duty is independent of a collective bargaining agreement, holding that even if the state claim requires a court to discuss and evaluate the same facts as it would when interpreting the agreement, so long as the court is not actually interpreting the agreement, there is no preemption. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988). If the state claim is not

"substantially dependent" upon an interpretation of the agreement, the cause of action is independent and can go forward. *Id.* at 410 n.10. In sum, any time a state cause of action requires the interpretation of a collective bargaining agreement, or invokes rights that are not independent of the agreement, section 301 preempts the claim.

Although section 301 has broad preemptive effect, this court has held that "[t]he preemptive reach of section 301 . . . is by no means boundless." *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 799 (6th Cir. 1990)." Section 301 preempts only state law claims that are 'substantially dependent on analysis of a collective bargaining agreement,' . . . not claims that only 'tangentially' involve CBA provisions." *Id.* at 799-800 (internal citations omitted).

The Ninth Circuit case, *Operating Eng'rs Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990), involved facts similar to those in the case at hand. There, the court ruled that a state law claim of fraudulent inducement did not require interpretation of the collective bargaining agreement. *Id.* at 538. The agreement at issue was an owner-operator agreement that the union presented to the employer claiming that the employer had to sign it to continue work at that job site. *Id.* The Ninth Circuit held that the fraudulent inducement claim was not preempted because it did not require the court to interpret the agreement but instead involved only the facts surrounding the formation of the agreement without reference to the agreement itself. *Id.* at 538-39.

The claim advanced by W&F--that the Union fraudulently induced it to sign the Employer Participation Agreements--like the claim in *Wilson*, does not require

interpretation of a collective bargaining agreement[3] or even of the Employer Participation Agreements themselves. Instead, the rights and duties at issue arise from the Union's actions prior to the formation of the Employer Participation Agreements. W&F alleges that the Union claimed it was seeking only to show W&F the benefits of having a union labor force, when in fact it was deceiving the employer into paying union benefits for all its employees. The relevant inquiry here concerns the representations made by the Union and/or Helldobler at the time the Project Agreements were executed, not any term of the Agreements themselves. Section 301 therefore does not preempt the third-party state law claim.

Finally, allowing the district court to rule on the fraud claim presents no threat to federal labor law. Because ruling on the fraud claim does not involve the interpretation of a collective bargaining agreement, ruling on that claim presents no challenge to the uniformity of federal law governing labor contracts. In short, section 301 does not preempt Walcher & Fox's claim of fraud in the inducement.

D. Individual immunity under Atkinson

Lastly, Helldobler claims that *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318

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[3] Although the Employer Participation Agreements incorporate the terms of a collective bargaining agreement, as we have previously noted, W&F was not a party to the collective bargaining agreement and the Union was not authorized to bargain on behalf of W&F's employees.

(1962) *overruled on other grounds by Boys Markets, Inc., v. Retail Clerks Union, Local 770*, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970) provides him immunity from suit. Helldobler misreads *Atkinson*. *Atkinson* addressed the question of whether individual union members could be held liable for the union's violation of a no-strike clause in their contract. The Supreme Court held that they could not. *Id.*, at 247-48. *Atkinson* does not stand for the more radical proposition advanced here by Helldobler, that union members are immune from suit for their individual acts simply by virtue of union membership. *See Felice v. Sever*, 985 F.2d 1221, 1230 (3d Cir. 1993) ("[The defendants] view the immunity extended by section 301(b) as covering all 'conduct related to their actions as Union officers.' . . . [T]he legal principle as enunciated by [the defendants] is too broad.").

Helldobler also cites two Ohio cases, *Sellers v. Doe*, 99 Ohio App. 3d 249, 650 N.E.2d 485 (Ohio App. 1994), and *Collins v. Lefkowitz*, 66 Ohio App. 3d 378, 584 N.E.2d 64 (Ohio App. 1990), in support of his claim of immunity. Each of these cases involved an attorney hired by the union to perform services on behalf of a union member in connection with the employer's disciplinary action against that union member. In each of those cases, the court held that the attorney was an agent of the union performing services as part of the collective bargaining process and was therefore immune from suit for malpractice by the union member. The facts of these two cases are easily distinguished from those in the instant case, and whether the attorney was acting on behalf of the union was not at issue in either of them.

The issue of whether Helldobler was actually acting on behalf of the Union when he committed his alleged fraud is

still open. More importantly, the immunity established by the Supreme Court in *Atkinson* and expanded in *Complete Auto Transit, Inc., v. Reis*, 451 U.S. 401, 417, 68 L. Ed. 2d 248, 101 S. Ct. 1836 (1981) (holding "that §301(a) does not sanction damages actions against individual employees for violating the no-strike provision of the collective-bargaining agreement, whether or not their union participated in or authorized the strike"), is immunity from actions brought under section 301 for "violation of contracts between an employer and a labor organization." Labor Management Relations Act of 1947, §301(a), 29 U.S.C. §185(a) (2001). We join the Third Circuit in concluding "that a state law claim brought against a union officer that does not implicate a collective bargaining agreement covered by section 301(a) does not give rise to section 301(b) immunity. When section 301(a) is inapplicable, the immunity provided by section 301(b) is also inapplicable." *Sever*, 985 F.2d at 1231.

The action before us today is not an action for violation of a contract between Walcher & Fox and the union. Walcher & Fox was not a party to the collective bargaining agreement with the union. Indeed, that fact is at the heart of Walcher & Fox's claims against Helldobler. Accordingly, we hold that Helldobler is not entitled to claim immunity from suit on this counterclaim.

Conclusion

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:98 CV 7443

[Filed January 12, 2000]

NORTHWESTERN OHIO ADMINISTRATORS, INC., *Plaintiff*,	)
v.	)
WALCHER & FOX, INC., *Defendant*.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KATZ, J.

This matter is before the Court subsequent to a bench trial limited to the issue of whether certain handwritten notations on two Project Agreements between Defendant/Third-Party Plaintiff Walcher & Fox, Inc. ("the Company") and Third-Party Defendant - International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local No. 55 (the Union") placed

Plaintiff Northwestern Ohio Administrators, Inc. ("NOA") on notice that the Company and the Union might have intended by those handwritten notations to alter the scope of the contracts at issue.

NOA filed the instant lawsuit on August 3, 1998, claiming that the Company's refusal to submit to a requested payroll audit and to remit benefits contributions for all of its employees, rather than for Union employees only, constitutes a breach of the five Project Agreements at issue. On July 29, 1999, the Company brought a third-party impleader action against the Union and Union business agent Val Helldobler. On November 4, 1999, the Union and Helidobler filed a Counterclaim against the Company, seeking an order to compel the dispute that is the subject of the Company's third-party complaint to binding arbitration.

On November 22, 1999, the Court conducted a bench trial limited to the issue of whether the Project Agreements obligate the Company to make benefits contributions as to each project on behalf of all its employees, or on only behalf of those employees who are Union members. For the following reasons, the Court finds that the notations did *not* place NOA on sufficient notice that the Company and the Union might have intended to alter the scope of the contracts thus creating a duty on NOA's part to investigate the potential ambiguity; therefore, NOA was entitled to rely on the printed portions of the contracts obligating the Company to make benefits contributions on behalf of all its employees, whether those employees are Union members or not.

FINDINGS OF FACT

Plaintiff NOA is a not-for-profit corporation that is charged with collecting employer contributions to various jointly-administered multi-employer employee benefit plans under the Employee Retirement Income Security Act ("ERISA") and the Labor-Management Relations Act ("LMRA").

The Company is a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings. It was formed on May 22, 1995, and usually employs between six and eight employees. Company co-owners James Walcher and Jeffrey Fox are involved in the day-to-day building operations as well as the management of the business. Neither Walcher nor Fox has ever belonged to a union.

In September of 1996, the Company began to work as a subcontractor on a job known as the Arkam Steel project, in Temperance, Michigan. On the day the Company began work, Union business agent Val Helldobler approached Walcher and tried to convince him that the Company should become a union signatory. Walcher declined because the Company was relatively new, and because he felt the Company could not afford to undertake that sort of commitment.

On September 18, 1996, Helldobler approached Walcher and Fox again, with a different proposal. He suggested that the Company hire one or two Union workers, with only those workers subject to Union pay and benefits scales, to demonstrate how good Union workers were.

Walcher and Fox agreed to that proposal, with the understanding that their treatment of non-Union workers would not be affected by the hire of Union workers.

Accordingly, the Company the Union entered into a Project Agreement obligating the Company to make fringe benefit and pension fund contributions to certain employee benefit plans, for each of which NOA is the administrator. The Project Agreement incorporated the terms and conditions of tho collective bargaining agreement ("CBA") entered into between the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union. It provides in relevant part that:

> 1. The Company hereby recognizes the Union as the representative of a majority of its employees designated, acknowledges receipt of a copy of the current Bargaining Agreement and agrees to be bound by the terms and conditions contained therein ....[and]
>
> * * *
>
> 4. The Company agrees to make the contributions and deductions to the said Plans at the times and in the amounts specified in the Bargaining Agreement, for all of its employees performing the work specified in the Bargaining Agreement.

The CBA, whieh was incorporated by reference into the Project Agreement, requires the Company to:

> make payments of fringe contributions and deductions to each and every employee benefit plan for all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union *(whether or not the employees are members of the Union).*

(CBA, Art.XXVI(B) ¶ 148 (emphasis added).) The Project Agreement also contains a standard merger clause providing that the written contract " constitutes the entire understanding and agreement on the matters covered herein and shall not be modified or amended except by the express written consent of the parties."

Thus, the plain language of the printed portions of the Project Agreement requires the Company to remit the required contributions for each employee on the Arkam Steel project, regardless of whether the employee is a Union member.

Walcher and Fox did not intend to agree to remit the required contributions for their employees who were not Union members. They orally agreed with Helldobler that the Company's fringe benefit contribution obligation applied only to employees who were also Union members, and memorialized that agreement by means of a handwritten notation on the face of the contract that read "2-men Arkam steel job only."

The Company and the Union subsequently entered into four additional Project Agreements on similar terms. The Project Agreement for the Crabb Road project, dated

December 13, 1996, contains a handwritten notation that reads "1 Journeyman & 1 Apprentice 8th man weekly benefit pay." The three Project Agreements for Midwest Tool & Die (April 2, 1997), Monroe Mold & Die Co. (April 14, 1997), and Unique Tool & Die (May 20, 1997) do nor contain any such notations. Walcher and Fox have both testified that the agreements were intended to cover Union employees only.

Helldobler did not provide the Company with a copy of the CBA or any other documents except the Project Agreements at any time between September 18, 1996 and May 20, 1997.

Between September 1996 and September 1997, the Company paid its fringe benefit and pension fund contributions obligations on a weekly basis, for the benefit of its Union employees only. The weekly payments and reports contained the names of one or two Union employees. No other Company employee joined the Union, and the Company did not comply with the CBA as to those employees. The Company maintained its own benefits plan for its non-Union employees.

Helldobler generally picked up the Company's weekly benefits check at the work site. He apparently knew that the Company was not making benefits contributions on behalf of all of its members. Helldobler never complained to the Company about its failure to make benefits contributions on behalf of its non-Union employees. The Union never grieved the Company's failure to make benefits contributions on behalf of its non-Union employees.

In September 1997, Helldobler conducted a meeting at the Unique Tool & Die job site and tried to convince the Company's non-Union employees to join the Union. Helldobler provided the Company with a copy of the CBA for the first time at that meeting. Helldobler also provided the Company's non-Union employees with Union cards to fill out. None of the non-Union employees decided to join the Union.

At around that time, the Company had two jobs in the Toledo, Ohio area - the Spartan Warehouse job and the Stony Ridge job. Helldobler insisted that the Company go all-Union if it were going to do those two jobs, despite the lack of interest from the Company's employees. When Walcher and Fox refused, the Union began picketing.

In late September 1997, Helldobler advised NOA that the Company had failed to make required fringe benefit contributions on behalf of all its employees under the five Project Agreements at issue. NOA immediately requested the Company to submit to a payroll audit for all of its employees performing work on all the projects covered in the Project Agreements. The Company refused, taking the position that it was required to submit to the audit only for its employees who were also members of the Union.

Between September 1996 and September 1997, NOA processed the Company's weekly checks for payntent of its fringe benefit and pension fund contributions obligations in the regular course of its business. NOA did not know how many people the Company employed.

NOA took no notice of the handwritten notations reading "2-men Arkam steel job only" and "l Journeyman &

1 Apprentice 8th man weekly benefit pay" on the first two Project Agreements. NOA collection agent Philip Smart and executive vice president Richard Watkins testified that the notations did not indicate to them that the Company and the Union intended to alter the scope of the Project Agreements. They testified that the cryptic notations were unclear to them, and that if the parties had intended to alter the scope of the Project Agreements, they should have interlined the portion that obligated the Company to make contributions for all of its employees.

Watkins testified further that he would not have accepted a Project Agreement that purported to include Union employees while excluding non-Union employees because such an agreement (a) would violate the LMRA,[1] and (b) would present an unacceptable risk of adverse selection.

CONCLUSIONS OF LAW

The sole issue before the Court at the November 22, 1999 bench trial was whether the Project Agreements obligate the Company to make benefits contributions on behalf of all its employees, or on only behalf of those employees who are Union members.

Section 515 of ERISA requires:

> [e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a

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[1] *See* 29 U.S.C. §158(a)(3).

> collectively bargained agreement [to], to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. §1145. Section 515 entitles a multiemployer plan to rely on the literal terms of written commitments between the plan, the employer, and the union. So long as the written documents do not place the plan on notice of any modifications or side agreements, the plan is "entitled to enforce the writing without regard to understandings or defenses applicable to the original parties." *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv.*, 870 F.2d 1148, 1149 (7th Cir. 1989). The actual intentions and understandings of the contracting parties are immaterial. *Bakery and Confectionary Union and Indus. I'ntl Health Benefits and Pension Funds v. New Bakery Co.*, 133 F.3d 955,959 (6th Cir. 1998).

Company co-owners Walcher and Fox presented significant, unrebutted evidence that they and Helldobler understood the Project Agreements would cover Union members only, and not employees who were not members of the Union. The course of negotiations, the notations on the contracts themselves, and the parties' course of dealing all indicate that the Project Agreements were intended to cover Union members only. But the *contracting parties'* understanding of their agreement is not the question before this Court.

The question before the Court is whether the cryptic handwritten notations on two of the Project Agreements sufficiently put NOA, the third-party beneficiary to the

contract, on notice of a modification to the printed terms of the Agreements. The Court finds that they did not.

First, the attempted amendments were not indicated on the contracts in a manner that would customarily be used to amend a contract. Ordinarily, a party who wishes to change the terms of a written contract does so by striking out the language that is to be removed, and by placing whatever amendments are intended in the text immediately adjacent to the strikeout. The parties to the contracts here at issue did not strike out the language requiring thc Company to pay benefits for all employees, in addition, the handwritten notations at issue are small and their placement on the contracts, near the signature lines rather than in the body of the text, is not calculated to draw attention to them, nor does it indicate to the casual observer that those notations are intended to relate to the text they are intended to amend.

Second, the attempted amendments, if effective, would have produced an illegal contract. NOA had no reason to suppose, in the absence of other notice, that the handwritten notations constituted an attempt to amend the contract in ways NOA knew to be illegal.

The Company has produced no other affirmative evidence, beyond the handwritten notations themselves, to indicate that NOA should have been on notice of a side agreement between the Company and the Union. It is undisputed that NOA did not know the actual size of the Company's payroll or the nature of the Company's business. NOA merely processed a number of contracts that purported to oblige the Company to pay benefits on behalf of all its employees. NOA is entitled to rely on that representation.

Accordingly, the Court finds that the Project Agreements at issue oblige thc Company to make benefits payments on behalf of all its employees, regardless of whether those employees are Union members.

IT IS SO ORDERED.

DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:98 CV 7443

[Filed January 12, 2000]

NORTHWESTERN OHIO ADMINISTRATORS, INC., *Plaintiff*,	)
v.	)
WALCHER & FOX, INC., *Defendant*.	)

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Project Agreements at issue oblige the Defendant/Third-Party Plaintiff Walcher & Fox, Inc. to make benefits payments on behalf of all its employees, regardless of whether those employees are Union members. A status conference is set for February 14, 2000 at 10:00 a.m.

/s/_____
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:98 CV 7443

[Filed July 9, 1999]

NORTHWESTERN OHIO ADMINISTRATORS, INC., *Plaintiff,*	)
v.	)
WALCHER & FOX, INC., *Defendant.*	)

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Plaintiff's motion for partial summary judgment and on Defendant's separate motions for leave to file an amended answer adding a counterclaim, and to file a third-party complaint and jury demand. For the following reasons, Plaintiff's motion for partial summary judgment will be denied. Defendant's motion for leave to file an amended answer adding a

counterclaim will be granted. Defendant's motion to file a third-party complaint and jury demand will be granted.

Defendant has not filed a motion for summary judgment, but has argued in its opposition to Plaintiff's motion for summary judgment that it (Defendant) is entitled to summary judgment. The Court will decline that invitation.

BACKGROUND

Plaintiff Northwestern Ohio Administrators, Inc. ("NOA") "is a not-for-profit corporation that is charged with collecting employer contributions to various jointly-administered multi-employer employee benefit plans under the Employee Retirement Income Security Act ("ERISA") and the Labor-Management Relations Act ("LMRA").

Between September 18, 1996 and May 20, 1997, Defendant Walcher & Fox, Inc. ("the Company") and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local No. 55 (the Union") entered into five separate Project Agreements obliging the Company to make fringe benefit and pension fund contributions to nine separate employee benefit plans, for each of which NOA is the administrator. The Project Agreements incorporated the terms and conditions of the collective bargaining agreement ("CBA") entered into between the Labor Relations Division of the Associated General Contractors of Northwest Ohio and the Union,

They provide in relevant part that:

1. The Company hereby recognizes the Union

> as the representative of a majority of its employees designated, acknowledges receipt of a copy of the current Bargaining Agreement and agrees to be bound by the terms and conditions contained therein .... [and]
>
> * * *
>
> 4. The Company agrees to make the contributions and deductions to the said Plans at the times and in the amounts specified in the Bargaining Agreement, for all of its employees performing the work specified in the Bargaining Agreement.

The CBA, which was incorporated by reference into each Project Agreement, requires the Company to:

> make payments of fringe contributions and deductions to each and every employee benefit plan for all employees of each such Participating Employer who are members of the collective bargaining unit represented by the Union *(whether or not the employees are members of the Union).*

(CBA, Art. XXVI (B) ¶ 148 (emphasis added).) The Project Agreements also contain standard merger clauses, each providing that the written contract "constitutes the entire understanding and agreement on the matters covered herein and shall not be modified or amended except by the express written consent of the parties."

Thus, the plain language of the printed portions of the Project Agreements, read in isolation, requires the Company to remit the required contributions for each employee on the covered projects, regardless of whether the employee is a Union member.

The negotiation history of the Project Agreements, along with some handwritten notations on two of the Project Agreements, indicates that the parties may have intended the Project Agreements to cover only employees who were current Union members. The first Project Agreement, for a project known as the Arkam Steel project, was signed on September 18, 1996, after negotiations between Union business agent Val Helldobler and Company co-owners James Walcher and Jeffrey Fox. Walcher and Fox have each testified that the parties orally agreed that the Company's fringe benefit contribution obligation applied only to employees who were also Union members, and that such agreement was memorialized on the first contract by means of a handwritten notation that reads "2-men Arkam steel job only." Helldobler denies that any such oral agreement was made, and says that the notation indicates only that the Union would provide two men for the Arkam Steel project.

The remaining four Project Agreements were entered on similar terms. The second Project Agreement contains a handwritten notation that reads "1 Journeyman & 1 Apprentice 8th man weekly benefit pay." The other three Project Agreements do not contain any such notations.

On October 13, 1997, NOA formally requested the Company to submit to a payroll audit for all of its employees performing work on all the projects covered in the Project

Agreements. The Company refused, taking the position that it was required to submit to the audit only for its employees who were also members of the Union.

On August 3, 1998, NOA filed the instant lawsuit, claiming that the Company's refusal to submit to the payroll audit and to remit benefits contributions for all employees, rather than for Union employees only, constitutes a breach of the Project Agreements. It brought this action under §301 of the LMRA, 29 U.S.C. §185, and ERISA, 29 U.S.C. §1132(e), seeking monetary and injunctive relief, liquidated damages, payment for an audit, and costs and attorney fees.

At a Case Management Conference conducted on November 18, 1998, the parties agreed to bifurcate discovery in this case between the issues of (1) the scope of the Project Agreements, and (2) the amount of liability, if any. Discovery concluded in the first phase of the case on April 9, 1999.

On April 30, 1999, NOA filed a motion for partial summary judgment on the scope of the Project Agreements, seeking judgment as a matter of law that the scope of the five Project Agreements includes all employees performing work covered by the Project Agreements. The Company has filed opposition to that motion, and has asked for judgment as a matter of law that the scope of the five Project Agreements includes only Union members performing work covered by the Project Agreements. NOA has filed a reply to the Company's brief.

On April 28, 1999, the Company filed two separate motions seeking to add (1) a counterclaim against NOA for

reimbursement of excess fringe benefits and pension fund contributions it allegcs it made to NOA, and (2) a third-party claim against the Union and/or Union business agent Val Helldobler for indemnity and/or contribution in the event thc Company is found liable to NOA. NOA has filed opposition to both motions, and the Company has replied thereto.

The Court discusses the parties' contentions below.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

The first issue before the Court is whether NOA is entitled to summary judgment on its claim that the scope of the five Project Agreements includes all employees performing covered work, rather than only Union members performing covered work.

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 191 L. Ed. 2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the

absence of a genuine issue of material fact. *Id.* at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2541,91 L. Ed. 2d 202 (1986) *(quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324, 106 S. Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Application to the Case at Bar

The issue presently before the Court is whether the scope of coverage of a contract can be determined as a matter of law, when the contract incorporates in one place a separate CBA provision stating that it applies to "all employees of each such Participating Employer who are members of the collective burgaining unit represented by the Union (whether or not the employees are members of the Union)," but

contains in another place a notation which can be construed to indicate that the parties intended the contract to cover only employees who were current Union members.

NOA argues that it is entitled to summary judgment on the scope of coverage because the printed portion of the contract unambiguously makes the contract applicable to all employees on covered projects, whether or not they are members of the Union. NOA argues further that the merger clause in the contract precludes any modification to the terms of the contract unless such modifications are made in writing.

The problem with NOA's argument is that additional written notations, which notations appear directly on the face of the contract, can be construed as limiting the coverage of the agreement to Union members only. Each side has offered a competing construction of the cryptic notation "2-men Arkam steel job only" on the face of one of the contracts. The Company's representatives have testified that the notation memorializes an agreement that the Company's benefit contribution obligation applied only to employees who were also Union members. The Union's representative has testified that the notation indicates that the Union would provide two men for the Arkam Steel project.

The "2-men Arkam steel job only" notation appears on the face of the contract, and both sides seem to agree that the parties intended it to be part of the contract. The notation is ambiguous. Both sides have offered colorable interpretations of the notation, and those interpretations would lead to different outcomes with regard to the scope of coverage issue. The ambiguity can be resolved only by means of extrinsic evidence, and that evidence is in conflict. Therefore, the

scope of coverage issue cannot be resolved on a motion for summary judgment.

Plaintiff's motion for partial summary judgment is, therefore, denied. The Court declines Defendant's invitation to enter partial summary judgment in its favor.

DEFENDANT'S MOTION TO ADD COUNTERCLAIM

The Defendant Company has moved for leave to add a counterclaim against NOA to recover excess fringe benefits and pension fund contributions it alleges it made to NOA. The Company says that it did not learn of the overpayments until discovery had been undertaken in this case.

NOA has opposed the Company's motion on the sole ground of timeliness. It argues that the Company unreasonably delayed its motion until after discovery closed and dispositive motions were due on the issue of coverage, and that such delay will require reopening discovery, will impose extra costs on NOA, and will postpone the ultimate resolution of this matter.

The Federal Rules of Civil Procedure permit a party who has omitted a counterclaim through "oversight, inadvertence, or excusable neglect" to raise the counterclaim by amendment by leave of court. Fed. R. Civ. P. 13(f). Leave to amend is freely given when justice so requires. In determining whether to grant leave to amend, courts consider such factors as whether the counterclaim is compulsory, "whether the non-moving party will be prejudiced, whether additional discovery will be required, and whether the court's docket will be strained." *Budd Co. v. Travelers Indem. Co.,*

820 F.2d 8787, 792 (6th Cir. 1987) (citations omitted). Delay in bringing the motion to add a counterclaim cannot be the sole reason for the denial of a Rule 13(f) motion, especially where no prejudice to the non-moving party has been shown. *See Tefft v. Seward,* 689 F.2d 637 (6th Cir. 1982) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In this case, the fact that the counterclaim is compulsory--that is, it arises out of the same transaction or occurrence that is the subject of NOA's claim, *see* Fed. R. Civ. P. 13(a)--militates strongly in favor of allowing the amended pleading, NOA has made no showing that it will suffer actual prejudice if amendment is allowed, since the discovery the parties have conducted to date concerns the scope of the Project Agreement, and the counterclaim concerns the measurement of damages. The additional discovery that will be required should not pose an unreasonable burden, since much of the discovery that will be required on the counterclaim is discovery in which the parties will have to engage in order to determine the amount of damages in the original claim. The Court sees no way in which its docket will be strained by allowing the additional claim. NOA has made no showing that the Company delayed bringing its counterclaim in bad faith or with a dilatory motive. On these facts, the Court finds that justice demands permitting the Company to bring its counterclaim.

Accordingly, the Company's motion to add a counterclaim against NOA is granted.

DEFENDANT'S MOTION TO ADD THIRD-PARTY COMPLAINT

The Defendant Company has also moved for leave to bring a third-party complaint against the Union and its representative, Val Helldobler, for indemnity and/or contribution in the event it is found liable to NOA. The Company says that it entered into the Project Agreements on the basis of Helldobler's oral representations that the Company would be responsible to make fringe benefit and pension fund contributions only for employees who were Union members. It seeks to bring claims of fraud and negligent misrepresentation against the Union and Helldobler.

NOA has filed opposition to that motion. It argues: (1) that permitting the third-party complaint will unreasonably complicate the issue in this case; (2) the third-party complaint is meritless; and (3) the Company unreasonably delayed bringing its third-party complaint.

The Federal Rules of Civil Procedure permit a defendant to implead any person who "is or may be liable to the [defendant] for all or part of the plaintiff's claim against the [defendant]." Fed. R. Civ. P. 14(a). The decision to permit a third-party complaint is within the sound discretion of the trial court, and impleader should generally be allowed on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings. *Lehman v. Revolution Portfolio, L.L.C.*, 166 F.3d 389, 393 (1st Cir. 1999). In determining whether to grant a party's motion to implead a third-party defendant, courts consider such factors as whether the party has unreasonably delayed bringing its motion to implead, whether allowing impleader

is likely to delay the trial, the potential for complication of issues at trial, and whether the original plaintiff will be prejudiced. *Ronson v. Talesnick*, 33 F. Supp. 2d 347, 356 (D.N.J. 1999).

In this case, the Court finds that justice demands permitting the Company to bring its impleader action. For the reasons given above in the discussion of the Company's motion to file a counterclaim, the Company's motion is not untimely, it is unlikely that trial will be delayed, and NOA has not shown that it will be prejudiced. The Court disagrees with NOA's contention that permitting the Company to implead the Union and Helldobler will unreasonably complicate the issues. It appears at this juncture that many of the arguments and evidence that the Company will use in its claims against the Union and Helldobler will be the same arguments and evidence that the Company will use in its own defense against liability to NOA. Whatever marginal increase in complexity that impleading the Union and Helldobler might add will be more than compensated by the increase in efficiency that trying the issues in one case, rather than two, will provide. The Court also disagrees with NOA's contention that the Company's motion should be denied because its claims against the Union and Helldobler are meritless. The Company has raised a facially viable claim of fraud in the execution and fraud in the inducement. While the Company's position may not ultimately prevail, it would be premature for this Court to deny the Company's impleader motion on that ground at this juncture, when the issue has been subject neither to discovery nor to complete briefing.

Accordingly, the Company's motion to implead the Union and Helldobler is granted.

CONCLUSION

For the foregoing reasons, Plaintiff Northwestern Ohio Administrators, Inc.'s motion for partial summary judgment (Doc. No. 35) is denied. Defendant Walcher & Fox, Inc.'s motion for leave to file an amended answer adding a counterclaim (Doc. No. 32) is granted. Defendant's motion to file a third-party complaint against the International Ornamental and Reinforcing Iron Workers, Local No. 55 and Val Helldobler (Doc. No. 33) is granted.

IT IS SO ORDERED.

/s/_____
DAVID A. KATZ
U.S. DISTRICT JUDGE